APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND FILED OCTOBER 4, 2001

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 00-20640

EPEC GAS LATIN AMERICA, INC;
EPEC BAJA CALIFORNIA CORPORATION,

Plaintiffs-Appellees,

versus

INTRATEC SA DE CV; INTRATEC RESOURCE CO., L.L.C.,

Defendants-Third-Party Plaintiffs-Appellants,

versus

EL PASO ENERGY CORPORATION;
EL PASO TENNESSEE PIPELINE CO.,

Third-Party Defendants-Appellees.

Appeals from the United States District Court
for the Southern District of Texas
(97-CV-2126)

Before REAVLEY, HIGGINBOTHAM, and PARKER, Circuit Judges.

Appendix A

PER CURIAM:*

We affirm for essentially the reasons stated by the trial court. We are persuaded that the antitrust claims of Intratec S.A. de C.V., defendants and third-party plaintiffs below, appellants here, suffer from lack of antitrust injury and that summary judgment was also properly granted on appellants' other claims. Appellants raise no genuine issue of fact regarding any injury suffered as a result of the asserted illegal diminution of competition. They were consultants to Tenneco, a relationship that by the end of 1976 was terminable at will on 30 days written notice.

Relatedly, we conclude, as did the district court, that there is no evidence of a breach of the consulting agreements. Whether or not Tenneco intended to proceed with the Baja project after the bid for Mexicali failed in August 1996, any failure to disclose breached no contractual provision or misled appellants. Appellants concede they would have had no claim if they had been informed in August of 1996 that the Baja project was not to be. Some, such as Ewell Muse, thought the project was dead and others, such as Mr. Holcomb, thought it was still worth pursuing. What is undisputed is that the Baja project was on the "back burner" and Mr. Ruben Mereles of Intratec Resources knew that. Mr. Mereles, for example, participated in two conference calls, on November 5th and November 21st, to discuss the Tenneco strategy for Mexico and the Baja pipeline was on neither

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* Pursuant to 5th CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th CIR. R. 47.5.4.

agenda — this during the time appellants maintain was critical to the future of the Baja project. Appellants never requested release from their covenants not to compete, although they knew that the Baja project was not being pursued throughout the fall of 1996 and Tenneco Baja terminated the 1994 and 1996 contracts under their 30-day notice provisions by letters dated February 10, 1997.

We find no merit to appellees' arguments and affirm the summary judgment granted by the district court.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION DATED APRIL 19, 1999 AND ENTERED APRIL 20, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION N0. H-97-2126

EPEC GAS LATIN AMERICA, INC.
and EPEC BAJA CALIFORNIA CORPORATION,

Plaintiffs,

v.

INTRATEC S.A de C.V. and
INTRATEC RESOURCE CO., L.L.C.,

Defendants and Third-Party Plaintiffs,

v.

EL PASO ENERGY CORPORATION
and EL PASO TENNESSEE PIPELINE CO.,

Third-Party Defendants.

Appendix B

ORDER

Pending before the Court is Third-Party Defendants' Motion for Partial Summary Judgment on Antitrust Claims pursuant to 15 U.S.C. §§ 2 and 18 (Document #83). After considering the motion, submissions, and applicable law, the Court has determined that the motion should be granted.

Facts

In the late 1980's, the Mexican government began discussing plans to modernize and expand its electricity-generating capacity in the state of Baja California, Mexico. Tenneco Gas Pipeline Company (Tenneco) formed a subsidiary corporation, Tenneco Baja, to explore the possibility of developing a natural gas transportation pipeline to serve the anticipated power plants in Mexico. An affiliated company with Tenneco, Tenneco power, simultaneously explored the possibility of developing the power plants themselves.

In 1992, Intratec Resource Company (Intratee Resource) entered into a contractual agreement with Tenneco Baja to promote the "Baja Project." The "Baja Project" pursuant to contract, was defined as United States pipeline facilities extending from Tenneco Baja's Kern River Pipeline in the Bakersfield area of California to the United States border with Baja California, Mexico. The parties agreed that Intratec Resource would consult with Tenneco Baja in the pursuit of developing a natural gas transportation pipeline to Mexico. In 1994, Tenneco Baja and Intratec Resource executed a new consulting agreement that superseded and canceled the 1992 prior agreement.

Appendix B

The 1994 consulting agreement specified the terms of the consultation agreement and the payment of services. Included in the agreement was a non-competition covenant preventing Intratec Resource from consulting for Tenneco Baja's competitors relative to the pipeline project, but leaving Intratec Resource free to pursue opportunities related to electric projects and fuel supply. The 1994 consulting agreement gave no guarantee to Intratec Resource that the pipeline under consideration would ever be built. In addition, Intratee Resource had no proprietary rights with regard to Tenneco Baja's pipeline project.

In 1995, the Mexican government enacted legislation and regulations eliminating the legal barriers to entry into the Mexican market. Intratec Resource worked with Tenneco Baja and Tenneco lower (the gas pipeline division and electric power generation division of Tenneco) in the planning and representation of these projects with the Mexican government. Tenneco Baja and Tenneco Power discussed with Intratec Resource the idea of a proposal to the Mexican government that the project be structured as a concurrent bid for transportation, gas and an electric power plant, *i.e.*, an integrated project. The idea was that Tenneco Baja, with Intratec Resource's assistance, presented to Mexico's Department of Energy, the economic and other data necessary to justify and sell the integrated project concept. However, there was never a formal agreement reached between Intratec Resource and Tenneco Power directed to this end.

In December of 1996, El Paso Energy Corporation (El Paso Energy) formally acquired Tenneco by merger. On February 10, 1997, Tenneco Baja (now known as El Paso

Baja California Corporation) formally exercised its right to terminate the 1994 consulting agreement with Intratec Resource.

El Paso Energy thereafter filed suit against Intratec Resource on June 20, 1997, in this Court, to obtain a judicial declaration of what their legal rights and duties were pursuant to the consulting agreement with Intratec Resource. In response, Intratec Resource asserted a breach of contract counter-claim along with antitrust claims against El Paso Energy. El Paso Energy requests this Court to consider its motion for summary judgment on the antitrust claims asserted by Intratec Resource pursuant to 15 U.S.C. §§ 2, and 18 against El Paso Energy.

Summary Judgment Standard

Pursuant to Fed.R.Civ.P. 56, summary judgment is appropriate if the movant establishes, through the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). When the moving party has carried its summary judgment burden, the respondent "must do more than simply show there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The respondent must produce evidence, mot merely argument, in response to a movant's properly supported motion for summary judgment. *Foval v. First Nat'l Bank of Commerce*, 841 F. 2d 126, 129 (5th Cir.1988). The introduction of a mere scintilla of evidence is not sufficient to avoid summary judgment. Rather, the non-movant must come forward with sufficient evidence

that, if admitted at trial, a verdict in his favor would be possible. *Spiller v. Ella Smithers Geriatric Ctr.*, 919 F.2d 339, 343 (5th Cir.1990).

Intratec Resource, the non-moving party, has responded to Defendant El Paso Energy's motion by presenting pleadings on file; excerpts from the affidavits of Lance Astrella and Ewell H. Muse; and the depositions of John Holcomb, Dennis Peseau and Alvin L. Alexanderson; accompanied with the expert reports of Howard D. Lutz.

Antitrust Claims

Intratec Resource asserts that El Paso violated 15 U.S.C. § 18 when El Paso Energy merged with Tenneco. 15 U. S. C. § 18 (a) provides that "no person engaged in commerce or any activity affecting commerce shall acquire . . . the whole or any part of the assets of another person engaged also in commerce . . . where . . . the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." According to Intratec Resource, the merger contributed to and resulted in the monopoly of the transportation of gas to Baja California, Mexico as evidenced by the cancellation of Tenneco Baja's proposal for the construction of the gas pipeline to Mexico. In turn, this allegedly left El Paso Energy's competitor, Pacific/Enova, free to construct a gas pipeline to Mexico without any competition from Tenneco Baja.

Intratec Resource further claims that El Paso Energy violated 15 U.S.C. § 2 by conspiring to monopolize the market of delivering gas to Baja California, Mexico via a pipeline system. 15 U.S.C. § 2 prohibits any person from

monopolizing or attempting to monopolize any part of trade or commerce. Intratec Resource alleges that because Pacific/ Enova is the largest purchaser of gas from El Paso Energy, El Paso Energy wanted to make sure that Pacific/Enova would be the winner of the bid from the Mexican government to construct the pipeline. In this way, El Paso Energy is assured that Pacific/Enova will continue buying gas from them in the future. Hence, Intratec Resource claims that they were effectively squeezed out of the market to construct a gas pipeline to Mexico when El Paso Energy canceled Tenneco Baja's proposed gas pipeline to Baja California, Mexico.

Analysis

This court must address the issue of whether Intratec Resource has standing to sue pursuant to 15 U.S.C. §§ 2 and 18. Standing to pursue an antitrust suit exist only if a plaintiff shows: 1) injury-in-fact, an injury to the plaintiff proximately caused by the defendants' conduct; 2) antitrust injury; and 3) proper plaintiff status, which assures that other parties are not better situated to bring suit. *Doctor's Hospital of Jefferson, Inc. v. Southeast Medical Alliance Inc.*, 123 F.3d 301, 305 (5th Cir. 1997) (citing *McCormack v. National Collegiate Athletic Ass'n*, 845 F.2d 1338, 1341 (5th Cir. 1988)). The first and third elements of the standing inquiry are not in dispute. Hence, the court must address only the second element; whether Intratec Resource has produced sufficient evidence of an antitrust injury to survive summary judgment on the claim that Intratec Resource has no standing to sue pursuant 15 U.S.C. §§ 2 and 18.

Appendix B

An antitrust injury is an injury "of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). The court's focus must be upon competition in the allegedly restrained market. *Bell v. Dow Chemical Co.*, 847 F.2d 1179, 1182 (5th Cir. 1988). "Restraint in the market affects consumers and competitors in the market; as such, they are the parties that have standing to sue." *Id.* "The antitrust injury must be to the plaintiff's business or property, that is, whether the plaintiff has a stake in the litigation." Robert L. Haig, Business and Commercial Litigation in Federal Courts § 53.3, 128 (1998). To be a competitor or consumer for antitrust standing purposes, it must be shown that the consumer or competitor has a business or property interest in the relevant market. Conversely, if plaintiff has no business or property interest, then plaintiff is not a competitor or consumer for antitrust purposes. In such case, plaintiff would have no standing to sue under the antitrust statutes. Therefore, Intratec Resource must produce evidence that it has a business or property interest in the market of exportation of gas and gas transportation services to the state of Baja California in Mexico to show that it is a competitor or a consumer within the meaning of the antitrust statutes.

Intratec Resource has failed to show that it is a competitor in the export of gas and gas transportation services to the state of Baja California in Mexico because Intratec Resource has no business or property interest in this market. The evidence shows that Intratec Resource owns no gas pipeline facilities that could serve Baja California, has executed no contracts to build or purchase any gas pipeline facilities that could serve Baja California, and has not bid on any contracts to build or purchase any gas pipeline facilities that could serve Baja

California. Intratec Resource was never prepared to build a gas pipeline to Baja California. Furthermore, Intratec Resource cannot claim a proprietary interest in Tenneco Baja's proposed pipeline because the 1994 consulting agreement specifically disclaims any proprietary interest for Intratec Resource. It only grants Intratec Resource the right to receive a consulting fee, which would be calculated as a percentage of Tenneco Baja's fixed construction costs. Payment of a consulting fee alone does not create a partnership or joint venture interest upon which to claim a proprietary interest. For these reasons, Intratec Resource is not a competitor in the Baja California gas transportation market. Therefore, Intratec Resource has no standing to sue as a competitor pursuant to 15 U.S.C. §§ 2 and 18.

Intratec Resource also has failed to show that it is a consumer in the export of gas and gas transportation services to the state of Baja California in Mexico because Intratec Resource has no business or property interest in Baja California, Mexico. Just as Intratec Resource never owned any pipeline facilities to transport natural gas to Baja California, Intratec Resource also never owned any facilities to consume gas transportation services in Baja California. Intratec Resource never executed or bid on any contract to build or operate a power plant. The evidence shows that Intratec Resource lacked the ability to design, build, finance or operate a power plant itself, and it never executed any contract under which any third party agreed to perform any of those tasks. Intratec Resource never sold or purchased natural gas in Baja California, and never executed any contracts to either buy or sell natural gas in Baja California. For these reasons, Intratec Resource is not a consumer in the

Baja California gas transportation market. Therefore, Intratec Resource has no standing to sue as a consumer pursuant to 15 U.S.C. §§ 2 and 18.

Intratec has failed tō produce sufficient evidence that creates a material fact issue concerning whether they were a competitor or consumer pursuant to 15 U.S.C. §§ 2 and 18. Intratec Resource's unsuccessful direct participation in a competitive process cannot be converted into an antitrust injury. Therefore, the plaintiff has not adequately asserted facts to support a finding of an antitrust injury in this case. Consequently, Intratec Resource has no standing to sue under the antitrust laws and El Paso Energy's motion for summary judgment must be granted.

Accordingly, the Court hereby

ORDERS that Third-Party Defendants' Motion for Partial Summary Judgment on Antitrust Claims pursuant to 15 U.S.C. §§ 2 and 18 (Document #83) is GRANTED.

SIGNED at Houston, Texas, on this 19 Day of April, 1999.

s/ David Hittner
DAVID HITTNER
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED NOVEMBER 19, 2001

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 00-20640

EPEC GAS LATIN AMERICA INC;
EPEC BAJA CALIFORNIA CORPORATION

Plaintiffs-Appellees

v.

INTRATEC SA DE CV; INTRATEC RESOURCE CO, LLC

Defendants-Third Party Plaintiffs-Appellants

v.

EL PASO ENERGY CORPORATION;
EL PASO TENNESSEE PIPELINE CO

Third Party Defendants-Appellees

Appeals from the United States District Court for the Southern District of Texas, Houston

Appendix C

ON PETITION FOR REHEARING

Before REAVLEY, HIGGINBOTHAM, and PARKER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

s/ [illegible]
United States Circuit Judge